

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**2006/HP/A002**

BETWEEN:

**ENESI BANDA**

**APPELLANT**

**AND**

**ABIGAIL MWANZA**

**RESPONDENT**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 3<sup>rd</sup> day of August, 2011.*

*For the appellant: Mr. J. Banda of Messrs A. M. Wood and Company.*

*For the respondent: Mr. K. Phiri, Senior Legal Aid Counsel, Legal Aid Board.*

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**J U D G M E N T**

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**Cases referred to:**

1. *Pettitt v Pettitt* [1970] A.C.777.
2. *Gissing v Gissing* [1971] A.C. 886.
3. *William and Glyn's Bank Limited v Boland* [1981] A.C. 487.
4. *Goodman v Gallant* [1986] Farm 106 A.C.
5. *Mundanda v Mulwani and Others* (1987) Z.R. 29.
6. *City of London Building Society v Flegg* [1988] A.C. 54.
7. *Nawakwi v Lusaka City Council Appeal Number 26, 2001* (unreported).
8. *Match Corporation v Choolwe Appeal Number 75 of 2002* (unreported).

**Legislation referred to:**

1. *Subordinate Court Act, cap 28, Order 44, rule 5.*
2. *Statute of Frauds 1677, s.4.*

**Works referred to:**

1. Charles Harpum, Stuart Bridge, and Martin Dixon, Megarry and Wade: The Law of Real Property (London Sweet and Maxwell 2008).
2. Nigel Lowe and Gillian Douglas, Browley's Family Law, (Oxford University Press, 2007).
3. Geoffrey Cheshire, M. P. Furnmston, and Cecil Herbert Starut ffoot, Cheshire and Ffoot's Law of Contract Butterworth, 10<sup>th</sup> edition, (New York, 1981).
4. Howarth, W. Natshells: Landlaw, Third Edition, London: (Sweet and Maxwell 1994).
5. Burn, E. H. Cheshires Modern Law of Real Property, Ninth Edition, London Butterworths Publishers Limited (1986) at page 65.
6. Halsbury's Laws England, 5<sup>th</sup> Edition, Volume 72.

The respondent in this matter will be referred to as the plaintiff, and the appellant as the defendant; the designations they were referred to in the Court below. This matter was commenced on 8<sup>th</sup> March, 2005, in the Subordinate Court of the First Class, by way of writ of summons. The plaintiff's claims were for the following:

1. Vacant possession of house number 18, Block 371, Chipata compound, which house was sold by the defendant's husband to the plaintiff;
2. Further, or in the alternative the return of K 8, 000, 000, being the purchase price of the said house;
3. Interest on the said sum; and
4. Costs.

During the trial, the plaintiff testified that her husband bought the property in issue from Kazumalo Bendicto Petrol, the husband to the defendant at a purchase price of K 8, 000, 000=00. The purchase price was paid in installments to the defendant's

husband. And the last installment was paid sometime in July, 2004.

During cross-examination, the plaintiff testified that she was not present when her husband transacted with the plaintiff. She also testified that she was not aware whether or not her husband also dealt with the defendant in the purchase of the property in issue. After the purchase price was paid in full, an occupancy licence was issued to the plaintiff by the Lusaka City Council.

The testimony of the plaintiff was supported by one witness; Mr. Humphrey Maliti. Mr. Maliti is the husband of the plaintiff. In essence Mr. Maliti confirmed that he bought the house in issue for the plaintiff. Mr. Maliti also confirmed that at the time the last installment was paid, a quarrel erupted between the defendant and her husband. Mr. Matili also testified that when differences arose between the plaintiff, and the defendant, the police advised them that the defendant that should refund the plaintiff, else the title to the property would be registered in the name of the plaintiff.

In defence, the defendant contended in the Court below as follows: that she was not aware that her husband sold the house in issue to the plaintiff. The defendant maintained that when the plaintiff showed her the occupancy licence attesting to the fact that the plaintiff had bought the house, she refused to vacate the house because her husband was not the owner of the house in issue.

During cross-examination, the defendant maintained that the house in issue was for her uncle, whose whereabouts, she did not know. And she further maintained that she did not know the whereabouts of her husband as well.

To support her testimony, the defendant called her 16 year old son; Christopher Kazumiro as her only witness. Christopher testified that the house belonged to his grandfather who lives in George compound. He also confirmed that when the dispute arose, the police advised his father to refund the purchase price to the plaintiff.

On 28<sup>th</sup> December, 2005, the judgment was delivered in the Court below. In the course of delivery of the judgment appealed against, Mr. Hampande observed that the plaintiff claims vacant possession of a house she bought from the defendant's husband. He however noted that the defendant has refused to vacate the house on the ground that she was not consulted by her husband when he sold the house to the plaintiff. Mr. Hampande noted that when the defendant became aware that her husband had sold the house, the police advised the defendant's husband to refund the plaintiff the purchase price. Mr. Hampande went on to observe that the defendant's husband failed to refund the plaintiff the purchase price, hence the adjudication of the dispute in the Court below.

After evaluating the evidence, Mr. Hampande found that the assertion by the defendant that she did not know the whereabouts of her uncle was disputed by Christopher when he testified that the defendant's uncle lives in George compound. Mr. Hampande went on to hold that after the defendant discovered that the house had been sold, she should either have sued her husband, or in the alternative, she should have called her husband as a witness. Mr. Hampande opined that this was not done because the house belonged to the defendant's husband. Mr. Hampande held that the only mistake the defendant's husband made was that he did not consult the defendant when selling the house. Mr. Hampande further held that could not consult the defendant, because the two were at the material time at logger heads.

In view of the foregoing, Mr. Hampande held ultimately that he was satisfied that on a balance of probabilities, the plaintiff had proved the claim against the defendant. Thus, Mr. Hampande, entered judgment in favour of the plaintiff. And ordered that vacant possession be granted within fourteen days from the date of the judgment. Wit the 28<sup>th</sup> December, 2005.

The defendant was dissatisfied with the judgment of the Court below. Consequently, on 10<sup>th</sup> January, 2006, she filed a Notice of Appeal. The Notice of Appeal, was followed with the filing of the grounds of appeal pursuant to Order 44, rule 5, of the Subordinate Court Act. The grounds of appeal were stated as follows:

1. The Court below erred in law in accepting the evidence of the plaintiff that she bought the house from the defendant. The defendant's husband had no authority, express or implied, to do so, nor did he own it either alone or jointly with the plaintiff;
2. The Registration and Agreement Form for House Owners in existing areas; (DD Form 5/79), shows that the house was originally owned by one Siwalunda John Chibungo who sold it to the defendant contrary to the evidence of the plaintiff;
3. The evidence of the plaintiff shows (in cross examination) that the defendant was not there when the defendant's husband went to the plaintiff's house. The defendant could not possibly have consented to the sell of the house;
4. The Court also relied on the evidence of one Humphrey Maliti who stated that the husband was selling the house. His evidence that title changed in favour of the plaintiff is not supported by any documentary evidence. The evidence was relied upon in the absence of any evidence which suggested that the husband had express or implied authority to sell the house. Indeed, the quarrel alluded to between the husband, and the defendant should have put the purchaser on constructive notice that the purported vendor had no authority whatsoever to deal with the property.

On 3<sup>rd</sup> December, 2010, Mr. Banda filed heads of arguments on behalf of the defendant. After recapitulating the grounds of appeal,

Mr. Banda contends that the plaintiff did not acquire good title to the property because the purported vendor; the defendant's husband, did not have express or implied authority, or indeed the defendant's consent, to sell the property in issue to the plaintiff. Mr. Banda further contends that the defendant has lived in the property since 1985, having acquired the same from her uncle; one Siwalunda John Chibungo.

Mr. Banda went on to submit that leasehold property is at law personal property. And therefore the conveyance of the leasehold may be made by a lessee in person, or by an agent duly and lawfully authorized by a power of attorney. Mr. Banda contends that there was no evidence adduced in the Court below to show that the purported vendor was duly, or lawfully authorised to deal with the defendant's property. Furthermore, Mr. Banda argued that there is no evidence on record to show that the purported vendor held any form of title which he could transfer to the plaintiff.

Mr. Banda drew my attention to paragraph 256 of the Halsbury's Laws of England, 5<sup>th</sup> edition, volume 72, which states as follows:

*"It has been held that a wife has no authority, by virtue of the marriage alone to contract on behalf of her husband without his authority, and that in order that the husband may be bound, he must expressly or impliedly authorize the contract, or must have so conducted himself as to be estopped from denying the authority or must have ratified the contract. It has also been held that a wife neither has presumed nor implied authority in any case to contract on behalf of her husband and herself jointly, unless they carry on a business in partnership."*

Mr. Banda urged that although these rules are derived from common law decisions on the authority of a wife to contract on her husband's behalf, he argued that they are germane to the contractual rights of either party to a marriage.

Mr. Banda contends that in light of paragraph 256 of the Halsbury's Laws of England, referred to above, a husband cannot similarly sell realty on behalf of his spouse, unless they are carrying on business as a partnership. In this case, Mr. Banda argued that there is no partnership in existence between the plaintiff, and the defendant. Thus the defendant's husband, Mr. Banda argued, further, had no authority to sell the house without the consent of the defendant.

Mr. Banda further maintains that the record of appeal shows at page 13, that when the plaintiff's husband purportedly bought the house from one Kazumalo Bendicto Petrol, the defendant was at Church. And their son had gone to school. In the circumstances, Mr. Banda submitted that the defendant did not know about the sell of the house. Thus the defendant did not authorize the sell for a valid contract to subsist between the plaintiff, and the defendant.

Furthermore, Mr. Banda contends that there is no evidence that the property in issue was registered in the defendant's husband's name. The evidence at page 12 and 13 of the record of appeal, also reveals that the defendant's husband was a national from Mozambique,



and therefore had no legal capacity to own land in Zambia. That being the case, Mr. Banda contends that the purported sell was void *ab initio*.

In addition, Mr. Banda contends that in terms of section 4 of the Statute of Frauds, 1677, transactions, or dealings in land must be evidenced in writing. And such writing must meet the threshold, of a “*note or memorandum*”. The learned authors of Cheshire and Fifoots Law of Contract, 10<sup>th</sup> edition, 1981, state at page 185 that:

*“The agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all material terms of the contract. Such facts as the names, or adequate identification of the parties, the description of the subject matter, the nature of the consideration, comprise what may be called the minimum requirements. But the circumstances of each case need to be examined, to discover if any individual term has been deemed material by the parties, and if so, it must be included in the memorandum.”*

Mr. Banda submitted that the pieces of writing on record, clearly do not qualify to meet the minimum requirements for a conveyance of land as required by law, because the defendant never executed any of the documents purporting to sell the property to the plaintiff. Thus, Mr. Banda argued that on that basis alone, the transaction should be set aside for being void, and the property reinstated to the defendant.

Mr. Banda, went on to argue that it is well known principle of common law that one cannot sell that which he does not own. The

term of art of this principle is *nemo dat quod no habet*. Mr. Banda submitted that this principle is particularly relevant to transactions relating to land. In this case, Mr. Banda contends that the defendant's husband could not sell that which he did not own; this fact in itself renders the transaction void. And the property is liable to be reinstated to the defendant.

Mr. Banda further contends as follows: first, that the plaintiff should have been put on inquiry to ascertain whether or not the defendant's husband had title to the property. Second, she should have enquired whether or not the defendant had consented to the property being sold. Third, there is evidence on record that the plaintiff's husband witnessed a quarrel between the defendant and her husband at the time that the plaintiff's husband went to the defendant's house. Fourth that there is also evidence on record that the defendant and her children where in occupation of the house. Fifth, that when matters came to a head, the plaintiff asked the defendant's husband to refund the money. The defendant's husband however, failed to refund the money. Lastly, there is evidence that the defendant's husband was a foreigner. In advancing the preceding assertions, Mr. Banda invited me to apply the doctrine of constructive notice.

Mr. Banda also pointed out that in the Court below, Mr. Maliti testified during cross examination that the defendant chased her husband; beat him; and even threatened to kill him. Mr. Banda

submits that this should have immediately put the defendant on inquiry as to who really owned the house in issue.

Mr. Banda also drew my attention to *Howarth, Land Law*, (Sweet and Maxwell 1994), where the learned author observes as follows:

*“A purchaser is under obligation to undertake full investigation of title before completing his purchase. He can only plead absence of notice if he made all usual and proper enquiries. If he does not do so, or is careless or negligent, he is deemed to have “constructive notice” of all matters he would have discovered. A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made, the standard of prudence, being that of a man of business under similar circumstances. The purchaser should inspect the land and make inquiries as to anything which appears inconsistent with the title, offered by the vendor”.*

In this context, Mr. Banda submitted that, first, if the plaintiff had investigated the title, she would have discovered that the defendant was in fact the owner of the house in question and not the husband. The plaintiff would then have fallen within the class of equity’s darling, and such protected. Second, that had the plaintiff investigated the title she would, as the learned authors of Cheshire’s Modern Law of Real Property explain as one of the object of investigating title:

*“discovered whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice that a purchaser is bound by any right which he would have discovered had he made ordinary investigations as sketched above. Again, if he fails to make inquiries of third persons who happen to be in possession of the land, he is affected with notice of all equitable*

*interests held by them as for example, an option to purchase the fee simple that has been granted to a lessee already in possession”.*

Third, that there was nowhere in the evidence of the plaintiff, or her witness where it was stated that there was an occupancy licence registered in the name of Kazumalo Bedicto Petrol; the defendant’s husband. Mr. Banda, thus submitted that, one wonders how the plaintiff could have determined that the property in issue actually belonged to Kazumalo Bedicto Petrol. In this regard, Mr. Banda drew my attention to the case of *Match Corporation v Choolwe and Another*, appeal number 75 of 2002 (unreported). Mr. Banda submitted that in the *Martch Corporation* case, it was said that:

*“On the facts of this case, and the authorities cited to us, we have no hesitation whatever to accept Mr. Shonga’s submissions that whatever title the Third Party obtained, is subject to the rights of the plaintiff. The evidence demonstrates to us that from the time the Third Party became interested in purchasing the property, he was aware of the presence of the plaintiff’s interest in the property”.*

Fourth, that Mr. Hampande’s statement that: *“...it is only prudent that upon knowing that her husband sold the house he should have sued or in the alternative should have called him as a witness. This wasn’t done for the reason that the house belonged to the defendant’s husband, and the only mistake he made was not to consult. Obviously, he could not consult because the two were already at logger heads,”* should be faulted.

Mr. Banda argued that the statement by Mr. Hampande is clearly in conflict with judicial precedents. Fifth, Mr. Banda submitted that the issue of consultation does not arise in relation to the owner of the house. Mr. Banda argued that the plaintiff should have made

enquiries at the Lusaka City Council to establish the owner of the house. Thus, the plaintiff should have established whether or not the defendant's husband had good title which he could pass. Sixth, Mr. Banda argued further that since the plaintiff, and her husband were aware that the defendant, and her husband were at logger heads, that fact should have alerted the plaintiff to carry out a proper inquiry as to who really owned the house. Lastly, Mr. Banda submitted, citing the case of *Nawakwi v Lusaka City Council and Another*, appeal number 26 of 2001, (unreported), that the purchasing of realty should not be approached as casually as purchasing household goods.

On 3<sup>rd</sup> December, 2010, Mr. Phiri filed the respondent's heads of arguments. First, Mr. Phiri submitted that there is no evidence to prove that the property in issue was jointly owned to justify the contention that the defendant's husband unilaterally dealt with the property without the consent of the defendant. Second, Mr. Phiri submitted that SS Form 5/79, referred to in the second ground of appeal, is not part of the record of appeal. Be that as it may, Mr. Phiri submitted that the Form is part of the "*ADDITIONAL DOCUMENTS TO BE USED AT TRIAL*", which was filed on 24<sup>th</sup> September, 2009. Mr. Phiri argued that the Form clearly shows that the initial owner was Siwalunda John Chibunga. Further, He submitted that in the same documents, there is a contract of sale between Chibungo and B.P. Kazumalo. Kazumulo, Mr. Phiri submitted, Mr. Kazumulo is the husband to the defendant.

Thirdly, Mr. Phiri argued that where realty is solely owned by a spouse, there is no provision at law which requires consent of the other spouse to dispose of the realty. Mr. Phiri argued further that the law only requires a vendor to obtain consent to assign from the President. Lastly, Mr. Phiri contends that in this matter the issue of notice arises because the defendant failed to prove that the realty was jointly owned.

On 3<sup>rd</sup> December, 2010, both counsel for the plaintiff, and the defendant supplemented their written submissions, with oral arguments. Mr. Banda argued on behalf of the defendant that the property in issue was a matrimonial property to which the defendant was entitled to. He argued further that at no time did the defendant's husband procure in his name an occupancy licence in respect of the property in issue. Mr. Banda maintained that what the evidence suggests is that the defendant's husband had no legal capacity to own land because he hails from Mozambique. He submitted that this assertion has not been challenged by the plaintiff. Thus he argued that if the plaintiff had conducted a proper inquiry before he entered into the purported contract of sale, she would have discovered that the defendant's husband was a foreigner who had no capacity to own land.

Mr. Banda pressed that he has drawn to my attention authorities which lay down that there is need for a purchaser of land to undertake a full investigation of the property before completing the transaction. Mr. Banda also reiterated the argument that when matters came to a head, the plaintiff sought a refund from the defendant's husband. Mr. Banda argued that the absence of the consent of the defendant to transact renders the whole transaction *void ab initio*. Lastly, Mr. Banda urged me to: allow the appeal, order cancellation of the occupancy licence; and direct that the property should be reinstated to the defendant.

In turn, Mr. Phiri submitted on behalf of the plaintiff that the only way in which title to property can be cancelled, is if there is proof of fraud in obtaining title. In this case, he argued that the defendant has not adduced any evidence to show that title to the property was fraudulently acquired. Mr. Phiri maintained that the only evidence that has been adduced is that the defendant was the wife to the vendor. Mr. Phiri contends that there is no legal requirement that in order to lawfully dispose of a matrimonial property, parties to a marriage must both consent to the transaction.

I am indebted to counsel for the spirited arguments, and submissions. In my opinion the questions that fall to be determined in this appeal are as follows:

1. Whether or not the defendant's husband was the legal owner of the house in issue;
2. Whether or not the defendant's husband had power to sell the house in question without the authority of the defendant;
3. Whether or not the plaintiff had constructive notice of the defendant's interest in the house; and
4. Whether or not the contract between the plaintiff and the defendant's husband complied with the Statute of Frauds of 1677.

**Was the defendant's husband the legal owner of the realty.**

The first question that falls to be considered is whether or not the defendant's husband was the legal owner of the realty in issue. The primary contention of the defendant in this appeal is that her husband was not the legal and exclusive owner of the realty in issue. And since her husband was not the legal and exclusive owner of the realty, the defendant has invited me to declare the transaction between the plaintiff and her husband a nullity.

It is settled law that a wife who contributes directly or indirectly to the acquisition of house has in an equitable share in the house. (See *Pettitt v Pettitt* [1970] A.C. 777; and *Gissing v Gissing* [1971] A.C. 886). Thus provided it is demonstrated that the spouse, usually, and not necessarily the wife, had made a substantial contribution to the overall household expenses, she would be held to have a beneficial share of the realty regardless of whether the



money was put towards the deposit or mortgage, and even though the house was in the husband's name alone.

*Pettitt and Pettitt* and *Gissing and Gissing* referred to above, also established that no special rules apply to the ownership of family assets, and that instead must apply ordinary property principles. The application of these principles requires first having to establish legal ownership, and then to determine, if need be, the equitable or beneficial ownership. (See Nigel Lowe and Gillian Douglas, Bromley's Family Law, Tenth Edition, (Oxford University Press, 2007) at p 153. In order to determine such an issue, one should first have recourse to the documents of title. For as Lord Upjohn said in *Pettitt v Pettitt* [1970] C.A 777 at 813E:

*"If the property in question is land, there must be some lease or conveyance which shows how it was acquired..."*

*If that document declares not merely in whom legal title is to vest, but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction, the parties cannot go behind it any time thereafter even on death or break up of the marriage."*

In *Goodman v Gallant* [1987] Fam 106, C.A., it was held (by the Court of Appeal), that if the document of title expressly declares in whom not only the legal title, but also the beneficial interest are to vest, it will be conclusive in the absence of fraud or mistake. If the document is silent as to the beneficial ownership, it is open to the non legal-owner to claim entitlement to a share of the property

under a trust. To substantiate such a claim, the claimant must establish that the legal owner holds the property in trust, *inter alia*, for the claimant. The establishment of such a trust is dependent upon the parties common intention, or their circumstances. (See Bromley's Family Law, (supra), at p 154).

I endorse the dictum of Lord Uphohn in *Pettitt v Pettitt (spra)*, as well as the holding in *Goodman v Gallant (supra)*. It needs to be noticed in this context that the concept of “*intention*” is a notional one. It does not necessarily reflect both parties intentions. As Lord Diplock pointed out in *Gissing v Gissing (supra)*, at p. 906, a party's intention in this context must mean that which his words and conduct led the other to believe that he holds. Further, it was held in *Midland Bank Plc v Cooke [1995] 4 ALL E.R. 562 at 574 – 5 C.A.*, that even if both parties admit that neither had discussed nor intended any agreement as to the proportion of their interests, this did not prevent the Court from inferring one.

The property in issue is situated in Chipata compound. There is no evidence on record to show that the defendant's husband was the registered owner of the property in issue. On the contrary the registration and agreement Form number 5/79 contained in “*Additional Documents to be used at Trial*”\_\_ shows that the house in issue was originally owned by one Siwalunda John Chibungo. I therefore find and hold that the defendant's husband was not the legal owner of the property in issue.

**Did the defendant's husband have power to sell the house.**

The second question that falls to be considered is whether or not the defendant's husband had power to sell the house. It is established by judicial precedents referred to above (*Pettitt v Pettitt (supra)* and *Gissing v Gissing (supra)*), that the wife who contributes directly, or indirectly, to the acquisition of a house obtains a share in the house. Suppose then that the husband sold the house over her head? Or charged it to a bank for his own debts without telling her anything about it? Would the purchaser, or the bank take it free of the wife's share?

This point arose in the leading case of *Williams and Glyn's Bank Limited v Boland* [1981] A.C. 487: The facts of the case were that the husband was registered as the sole proprietor of the legal estate of the matrimonial home, but the wife had contributed a substantial sum towards the purchase, and was admittedly an equitable tenant in common to the extent of her contribution. The husband later executed a legal mortgage to the appellant bank, which made no enquiries of the wife. When the husband failed to pay the sum secured, the bank started proceedings for possession of the house with a view to selling it under the powers as mortgagees. The wife resisted the action. The House of Lords held that the wife's physical presence in the house coupled with the right to exclude others

without a right to occupy, clearly gave her actual occupation, and the fact that the husband (the owner of the legal estate) was also in occupation could not affect this. Furthermore, although the land was held on what was then a trust for sale, pending sale the wife had an interest subsisting in reference to the land itself. Her claim therefore succeeded.

Thus once a wife or husband as the case may be, is in occupation, a purchaser, or lender would be well advised to make inquiry of the wife or husband. If then a wife or husband discloses her or his rights, a prospective purchaser, or lender takes the said property subject to those rights. If he or she does not disclose them, a purchaser, or lender takes the property free of those rights. Furthermore, where a property is jointly owned (whether in law or and in equity), a wife, or husband, as the case may be, has no authority by virtue of the marriage alone, to contract on behalf of the husband, or wife without his or her authority. In order for a husband or wife to be bound he or she must expressly or impliedly authorize the contract, or must have so conducted himself or herself as to be estopped from denying the authority, or must have ratified the contract.

On the facts of this case, I accept the submission by Mr. Banda that the defendant was not aware about the transaction between the plaintiff and the defendant's husband. In the circumstances, the defendant could not have authorized the sell of the property to the

plaintiff. In any event, when matters came to a head, the plaintiff asked the defendant's husband to refund the money, I therefore find, and hold that the defendant did not authorize the transaction between the plaintiff, and the defendant's husband.

**Did the plaintiff have constructive notice of the defendant's interest in the house.**

The third question that falls to be determined is whether the plaintiff had constructive notice of the defendant's interest in the property. The basic and operative principle was summarized by Lord Oliver in *City of London Building Society v Flegg* [1988] A.C. 54 at 83, in the following terms:

*"The reason why a purchaser of the legal estate (whether by way of outright sale or by way of mortgage) from a single proprietor takes subject to the rights of the occupying spouse is... because, having constructive notice of the trust as a result of the beneficiary's occupation, he steps into the shoes of the vendor, or mortgagor, and takes the estate subject to the same equities as those to which it was subject in the latter's hands, those equities and their accompanying incidents not having been overreached by the sale..."*

The legal position is therefore that anyone dealing with land will be protected only by the general equitable doctrine that a *bona fide purchaser of a legal estate for value*, will take it free of any equitable interest of which he does not have actual or constructive notice. Charles Harpum, Stuart Bridge and Morton Dixon, Megarry and Wade. The law of Real Property (London Sweet and Maxwell 2008) state in paragraph 8 – 019 at page 264 that:

*“The mere fact that there is on the land a person, such as a spouse, whose presence is not inconsistent with that of a vendor does not obviate the need for the purchaser to make inquiry of them. The old view to the contrary has now been discredited. If, for example, a husband is sole legal owner of land, but his wife has an equitable interest in the property by reason of some contribution to the cost of its acquisition, any purchaser will be bound by her interest unless was not disclosed after proper inquiry by her. There may of course be circumstances on which a person in possession of land is estopped from asserting any interest in it.”*

In my opinion purchasers and lenders should inquire about equitable interests with no less diligence than about legal interests, even if this compels them to make distasteful, and embarrassing questions about the occupation of the property by a spouse, and which in any case they could ignore at their own peril. I therefore accept the submission by Mr. Banda that the plaintiff should have undertaken full investigation of the title before completing the purchase. Such investigation should have included making inquiries about the persons in occupation of the house, as well as conducting a search at the Lusaka City Council. On the facts of this case, I therefore hold that the plaintiff had constructive notice of the equitable or beneficial interest of the defendant. Did the contract of sale comply with the statute of fraud.

### **Did the contract of sale comply with the Statute of Fraud.**

The last question that falls to be considered is whether, or not the contract of sale complied with the Statute of Frauds. A contract to sell or make any other disposition of any interest in land differs

from other contracts in at least three main respects. First, such a contract can only be made in writing in accordance with the formalities laid down by section 4 of the Statute of Frauds, 1677. Second, the usual remedy for the enforcement of such contract is specific performance rather than the normal award of damages. (See *Mundanda v Mulwani and Others* (1987) Z.R. 29). Third, as a consequence of this, a purchaser even before conveyance acquires an immediate equitable interest.

Section 4 of the Statute of Frauds, 1677, provides that:

*“No action shall be brought upon any contract for the sale of other disposition of land or interest in land unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person there unto by him lawfully authorized.”*

The agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract. The material terms include the names, or adequate identification of the parties; the description of the subject matter of the contract, and the nature of the consideration. These constitute what may be called the minimum requirements. On the facts of this case the purported contract between the plaintiff and the defendant's husband does satisfy the requirements of section 4 of the Statute of Frauds 1677, because the note or memorandum contained in the *“Additional Documents to be used at Trial,”*

adequately identifies the parties; the description of the property; and the manner in which the purchase price was settled. I therefore find and hold that section 4 of the Statute of Frauds was complied with.

In the final result, I however allow the appeal, because the defendant was not the legal owner of the house: he did not have the power to sell the house; and the plaintiff had constructive notice of the defendant's interest in the house.

For avoidance of doubt, the lawful owner of the house in dispute is the defendant, and the Lusaka City Council, is accordingly ordered to amend the records. Costs follow the event. And leave to appeal is hereby granted.

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**Dr. P. Matibini, SC**  
**HIGH COURT JUDGE**